Supreme Court, U. S.
FILED
NOV 22 1977
MICHAEL RODAK, JR., CLERK

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-682

SANTA CLARA PUEBLO, et al, *Petitioners,*

v.

JULIA MARTINEZ, et al, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF

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REPLY BRIEF

ARGUMENT

I. THE DISTRICT COURT DID NOT HAVE JURISDICTION

A. Background and Purpose of ICRA

Contrary to Plaintiffs' allegations, the legislative history of the ICRA clearly shows that Congressional intent was to provide for federal judicial review only when an Indian tribe has deprived a person of liberty. The only judicial remedy that Congress provided was the writ of habeas corpus.

It is important to note that Congress did not pass early bills, which were introduced, which would have given the ICRA the breadth and scope Plaintiffs allege that it has. S.962 would have authorized direct appeal of all tribal court criminal convictions to federal district courts with the right of trial de novo, and S.963 would have empowered the Attorney General to investigate complaints of denial of Constitutional rights of Indians by tribes and to bring appropriate criminal or civil actions to vindicate the rights denied.

Both of the above-mentioned bills were opposed by the Interior Department on the grounds that they would unnecessarily burden the federal court system and these bills were not passed. Hearings on S.961, S.962, S.964, S.966, S.967, S.J. Res. 40, to Protect the Constitutional Rights of American Indians, before the Subcommittee on the Judiciary, 89th Cong., 1st Sess., at 19, 23 (1965) (Testimony of Frank Barry, Solicitor of the Department of the Interior). The present habeas corpus provision of the ICRA was then added to S. 1843 Bill as a limited replacement and this was the Bill which was finally passed by Congress. The limitation of judicial review of tribal action to habeas corpus proceedings is a logical compromise by Congress of the competing interests of the protection of the individual's constitutional rights, the burden on the federal judiciary of review of tribal actions, the need to allow tribal governments a large measure of self-autonomy and cultural identity, and the traditional immunity of tribal governments from suit.

Congress intended only to allow a limited intrusion into the internal affairs of Indian tribes when there was an unconstitutional detention of a person and not

to allow review by the federal courts of every tribal action.

B. Equitable Remedies

Plaintiffs' argument that the express habeas corpus remedy is not the sole remedy and that an equitable remedy must be implied to achieve the purposes of the ICRA is invalid.

The line of cases cited by Plaintiffs beginning with *Martinez* v. *Southern Ute Tribe,* 249 F.2d 915 (10th Cir. 1957) cert. denied 356 U.S. 960 and ending with *Iron Crow* v. *Oglala Sioux Tribe,* 231 F.2d 89, (8th Cir. 1956) may have been a factor in the consideration of bills concerning the civil rights of Indians but the ICRA as finally passed by Congress was an end product of the balancing of competing interests, as previously described above.

Federal court jurisdiction with implied equitable remedies is not necessary to achieve the purposes of the ICRA. The Secretary of the Interior has the power to disapprove tribal ordinances which are inconsistent with the ICRA. 25 U.S.C. § 476, 18 U.S.C. § 1161. In addition, the ICRA is enforceable in Indian tribal courts. Plaintiffs admit that the ICRA contains no explicit grant of jurisdiction over actions by Indian tribal governments except for habeas corpus, but they argue, and the Tenth Circuit Court of Appeals agreed with them, by incorrectly holding that the District Court had jurisdiction under 28 U.S.C. S. 1343(4) which provides:

> The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person. . .

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of Civil Rights, including the right to vote.

This statute grants jurisdiction only and does not in any way waive tribal sovereign immunity. *Corbean* v. *Xenia City Board of Education,* 366 F.2d 480 (6th Cir. 1966) cert. denied, 38 S.U.S. 1041; *Peterway* v. *Veteran's Administration Hospital,* 495 F.2d 1223 (5th Cir. 1974).

Federal district courts have jurisdiction under 28 U.S.C. S.1343(4), only when a separate act of Congress establishes a cause of action and authorizes suits. The ICRA is not an act "providing for the protection of civil rights". It is a declaration of rights and not a remedy for deprivation of said rights. This Court recently held in *United States* v. *Testan,* 424 U.S. 392 (1976) that the Tucker Act, 28 U.S.C. § 1491, which is analogous to 28 U.S.C. § 1343(4), does not create any substantive rights enforceable against the United States, nor does it waive sovereign immunity. This Court held in *Testan,* that the Tucker Act merely gave jurisdiction to the Court of Claims to render judgment against the United States in appropriate cases.

The recent decision by this Court in *Califano* v. *Sanders,* 97 S.Ct. 980 (1977) is determinative of the issue of whether there is an implied grant of federal jurisdiction in the ICRA. In *Sanders, supra.* the question before this Court was whether federal courts have jurisdiction under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702-706, to review a decision by the Secretary of Health, Education and Welfare refusing to reopen a previously adjudicated claim for

Social Security benefits. Section 10(a) states "A person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to a judicial review". This Court reversed the Seventh Circuit Court of Appeals, and denied federal court jurisdiction holding that Section 10 was not phrased like the usual grant of jurisdiction to proceed in the federal courts. Section 10 did not contain an explicit grant of jurisdiction to challenge agency action in the federal courts, and the alleged right to judicial review of agency action was ambiguous. *Id.* at 983, 984.

The Court further held that there was a lack of evidence supporting the asserted congressional intent that Section 10 granted jurisdiction. *Id.* at 984.

The Seventh Circuit's rational for implying jurisdiction, namely that the litigants needed some access to federal courts, was not found to be "compelling" because Congress had recently amended the general federal question statute 28 U.S.C. § 1331(a) to provide federal jurisdiction to review most federal agency actions. *Id.* at 984-985.

The *Sanders* decision is directly in point with the case at hand. As in *Sanders,* there is no explicit grant of federal subject-matter jurisdiction in the Indian Civil Rights Act, and there is no explicit evidence in the legislative history of congressional intent to create the asseted federal jurisdiction. Also, there is no "compelling" reason to imply jurisdiction under the Indian Civil Rights Act, because most tribal actions are reviewable by the Secretary of the Interior and because one can always challenge tribal action under the ICRA in tribal court.

In fact, the *Martinez* case against the implication of federal jurisdiction is far stronger than the case presented in *Sanders,* because the ICRA explicitly grants federal jurisdiction in habeas corpus cases and is silent on any further grant of jurisdiction. Thus, the ICRA expressly provides a limited enforcement mechanism while the APA ensures a general right of federal judicial review of agency action.

Plaintiffs' reliance on *Bell* v. *Hood,* 327 U.S. 678 (1946); *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971); and *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968), in urging this Court to imply federal court jurisdiction in the present case is unwarranted. These cases differed from the present case in that the ICRA provided a specific and sole federal judicial remedy for violation of its terms, the writ of habeas corpus.

Congress provided the federal courts with jurisdiction to enforce the ICRA. It intentionally limited the federal courts to review of unlawful detentions by tribal governments.

C. Sovereign Immunity

Plaintiffs' argument and the Tenth Circuit's holding in this case, that the ICRA is meaningless unless sovereign immunity is waived by implication, because there is no express waiver in the ICRA, is incorrect.

Indian tribes enjoy sovereign immunity from suit unless that immunity has been expressly waived. Puyallup Tribe, Inc. The Department of Game of Washington, No. 76-423, decided June 23, 1977, Slip. op. 7.

The sole remedy in the ICRA of a writ of habeas corpus would be directed only to the individual responsible for the detention and not the Indian tribe itself and therefore this section cannot be read as a waiver of tribal immunity, although it would protect a person against unconstitutional detention.

Plaintiffs further argue that the "Senate knew full well that the very enactment of an Indian Bill of Rights would be a federal limitation on tribal sovereignty", because of some legislative history which even if viewed in the light most favorable to Plaintiffs is no more than ambiguous and equivocal. The Plaintiffs would have this Court accept the untenable idea that Title IV of the ICRA expressly recognized the sovereign power of an Indian tribe to refuse to relinquish criminal or civil jurisdiction over its territory to the States but that other sections of the same Act, by unnecessary implication, abrogated the power of the tribe to withhold its consent to a civil cause of action in federal court.

Plaintiffs continually stress that they seek prospective equitable relief and not monetary damages. However, they do not point out how they propose to limit the results of their requested relief.

If this Court accepts the premise that Indian tribes have no immunity under the ICRA for equitable relief, there would be no logical basis for not allowing civil actions against Indian tribes seeking monetary damages.

The purposes of the doctrine of tribal sovereign immunity are two-fold. The doctrine is a recognition of the sovereignty of Indian tribes and it is also a means to protect the financial existence of the Indian tribes. The Indian tribes cannot afford to be constantly defending their laws, cultures and traditions in federal courts and Congress did not express any intention that they be forced to do so by passing the ICRA.

II. DEFENDANTS SHOULD PREVAIL ON THE MERITS

A. Section 1302(8) Does Not Embody the Same Standards as the United States Constitution

Plaintiffs are in error when they state that the fact Congress was aware of the decision of *Colliflower* v. *Garland*, 342 F.2d 369 (9th Cir. 1965), is evidence that Congress intended the ICRA to be closely patterned after the Constitution itself.

Section 1302(8) provides that no Indian tribe shall:

> . . . deny to any person within its jurisdiction the equal protection of *its* laws or deprive any person of liberty or property without due process of law (emphasis supplied).

The Fourteenth Amendment provides that a State may not "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of *the* laws. U.S. Constitution, Amendment XIV. Sec. 1 (emphasis added).

Only a portion of Sec. 1. of the Fourteenth Amendment is included in Section 1302 and that portion differs significantly from the language of the Fourteenth Amendment.

The legislative history clearly indicates that the equal protection clause of the ICRA was not intended to be identified with the equal protection clause of the Fourteenth Amendment but instead imposed only a duty of even-handed application of the Tribe's laws.

> Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary. United States Senate, 89th Cong. 1st sess. (1965)

> p.18 (Remarks of Assistant Secretary of Interior, Frank Barry).

As the Senate Subcommittee stated in its Summary Report:

> The Department of Interior's bill would, in effect, impose upon the Indian governments the same restrictions applicable presently to the federal and state governments with several notable exceptions, viz., the Fifteenth Amendment, certain other procedural requirements of the Fifth, Sixth and Seventh Amendments, and in some respects, the equal protection requirement of the Fourteenth Amendment. (Emphasis supplied).
>
> Summary Report of Hearings and Investigations by the Subcommittee and Constitutional Rights of the Committee of the Judiciary, United States Senate, 89th Cong. 2nd Sess. (1966) p.25.

Furthermore, the Tribal representatives were assured by Congress that the equal protection guarantee would only require that tribal law be administered fairly; it would not call into question the tribal law itself.

> Hearings on Title II of the Civil Rights Act of 1968 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Congress, First Sess. at 19, 40 (1969) (Remarks of Sen. Ervin).

B. The 1939 Ordinance Is Rationally Related to the Preservation of the Santa Clara Culture

Plaintiffs admit that the application of the equal protection clause of the ICRA in the context of an Indian tribe with distinct cultural traditions and social organization will and should differ from the application in federal and state contexts.

This Court has held that laws dealing only with Indians may pass Constitutional scrutiny where the identical laws if applied to non-Indians would not pass Constitutional scrutiny. This is because Indian tribes are unique sovereign entities and the distinctions allowed them are reasonably related to Indian self-government and Indian cultural autonomy and tribal survival.

United States v. *Antelope*, . . . U.S. . . . 51 L.Ed. 2d 701 (1977), *Fisher* v. *District Court*, 424 U.S. 382 (1976), *Morton* v. *Mancari*, 417 U.S. 535 (1974), *Delaware Tribal Business Committee* v. *Weeks*, . . . U.S. . . . 97 S.Ct. 911 (1977).

Plaintiffs ask this Court to determine whether the 1939 Ordinance significantly furthers a legitimate governmental purpose and to then determine whether the importance of the Tribe's purpose outweighs the importance to the individuals. To apply this type of test requires, as the district court pointed out, that the court determine which traditional values will promote cultural survival and which will not. This determination can be properly made only by the people of Santa Clara Pueblo themselves.

It is impossible for non-Indian jurists, schooled and experienced in the Anglo-American legal tradition, to leave that safe harbor and to venture into a totally unknown culture that pre-dates the founding of this country by centuries. It simply cannot be done. This is proved beyond question by the Court of Appeals decision and by the briefs of Respondent and their amicus. They give weight to economic circumstances but ignore an undisputed record of the deep theocratic and social forces undergirding the disputed ordinance. These an-

alyses unsuccessfully attempt to identify the culture of the Santa Clara Pueblo, to choose those aspects of this ancient culture they believe are worth preserving, and to decide how best to preserve this altered culture. These are inquiries attorneys and federal judges are singularly ill-equipped to handle. That is the reason Congress has never given them that responsibility.

Plaintiffs and their amicus argue that the Pueblo has no cultural stake in the outcome of this case. This is nonsense. The formulation of membership criteria is the ultimate act of tribal self-definition. If the Santa Clarans are unable to determine who is and who is not a Santa Claran, then the cultural autonomy of the Santa Clara Pueblo has been destroyed.

To create for federal judges a role in the government of Indian tribes is a drastic step. It is fundamentally inconsistent with federal Indian policy. Congress, when it passed the ICRA, allowed for such a supervisory role, only in the most serious cases where a writ of habeas corpus is appropriate.

Admittedly this Court in a divided opinion in the case of *Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632 (1974), did hold that the conclusive and irrebuttable presumption that school teachers in their fifth month of pregnancy were incapable of continuing work was a violation of the due process clause of the Fourteenth Amendment to the United States Constitution. The Court did so on the basis that this presumption was neither necessarily nor universally true, because of the sharply divided medical expert testimony. The Court did indicate, however, that a regulation requiring a termination of employment at some fixed date during the last few weeks of pregnancy might pass Constitutional scrutiny even though the new regulation was also a conclusive and irrebuttable presumption.

The Santa Clara Pueblo submits that reliance on *Cleveland Board of Education* v. *La Fleur,* supra, for a determination of the issues in the present case is unwarranted as the application of due process rights in an Indian context is totally different.

The trial court which listened to and observed the witnesses testify, found that the 1939 Ordinance was rooted in certain traditional values *Martinez* v. *Santa Clara Pueblo,* 402 F.Supp. 5 (D.N.M. 1975). The trial court also found that the Santa Clara Pueblo was traditionally patrilineal and patrilocal and that the membership of [redacted] parents and marriage either within or out of the Pueblo has always been considered a highly significant factor in membership determinations. *Martinez,* Supra. p16. These findings are substantiated by the overwhelming weight of the evidence presented during the trial and the Court of Appeals should not have engaged in independent fact-finding. The district court's findings must stand unless this Court finds them to be "clearly erroneous"; the question is not whether this Court would have reached these same findings. *Zenith Radio Corp.* v. *The Hazeltime Research, Inc.,* 395 U.S. 100, 122-23 (1969); *United States* v. *National Association of Real Estate Boards,* 339 U.S. 485, 495-496 (1950); *United States* v. *Yellow Cab Co.,* 338 U.S. 338 (1949).

Although the district court did not make a finding as to whether the Santa Clara Pueblo was patricultural, matricultural or bicultural, the undisputed testimony of Dr. Ellis (Tr. 330-333) clearly warrants a finding that the Santa Clara Pueblo is a patricultural society.

The above-mentioned findings do justify the Ordinance notwithstanding economic considerations present in 1939, and present today.

Where a group is patrilineal, patrilocal and patricultural, as the Santa Clara Pueblo is, the classifications embodied in the 1939 Ordinance reflect the view that a woman member of the Pueblo who marries outside the Pueblo is more likely to leave it than a male member and the children are more likely to be raised as cultural outsiders. The fact that the women are more likely to take up residence in the community of their husband is borne out by the finding of the trial court that sixty percent of the nonresidents of the Pueblo were women. *Martinez* v. *Santa Clara Pueblo,* supra. P.16. The record does not demonstrate that this statistical imbalance is caused by women leaving the Pueblo because of the exclusion of their children from membership. This is merely one possible hypothesis propounded by the Plaintiffs. The Defendants submit that it is the patrilocal tradition of the Pueblo itself which is the cause of the statistical imbalance.

Plaintiffs charge that the Pueblo was unwilling to assist Mrs. Martinez to obtain medical care for her gravely ill daughter is totally incorrect. Respondent's Brief P.49. (Tr. 23-26, 45-47). The Pueblo had no control over whether or not the Martinez children would obtain medical care. This was a matter solely within the province of the Bureau of Indian Affairs. (Tr. 113-115)

If the Santa Clara Pueblo's intent was only to conserve their limited resources by excluding a certain class of people as members they would not have allowed as an exception to the enforcement of the 1939 Ordinance, the situation of illegitimate children who

are given full membership rights in the Pueblo (Tr. 145). This exception is based on the presumption that the child will remain on the Pueblo and that the child will be brought up culturally as a Santa Claran, even though the granting of membership rights to the child is a dilution of the Tribe's assets.

The Martinez family includes a number of male children. It is noteworthy that while a Martinez girl can conceivably marry a Santa Clara male member and thus gain tribal membership for her children, the Martinez males can never have offspring entitled to membership in the Pueblo. It therefore becomes obvious that what has been attacked as gender based discrimination is in fact not sex based at all.

The Ordinance which has been in effect in writing for thirty-eight years is the embodiment of the collective judgment of the Tribe as to the appropriate classification for the preservation of the Tribe. Although this Ordinance may not provide a "fair" result in every case under Anglo-Saxon concepts of "fairness", no classification, whether blood quantum or otherwise would. It is enough that this Ordinance has a rational basis . . . the preservation of the Santa Clara Pueblo as a distinct sovereign entity with an autonomous culture in our American society. (Tr. 251).

The Court of Appeals should not try to determine which traditional values will promote cultural survival and which will not. They should be concerned only that the Ordinance be applied even-handedly. By determining whether the decision of the Santa Clara Pueblo in enacting this Ordinance was wise and proper, the court of appeals is starting a process which will culminate in the destruction of the cultural identity and very existence of the Santa Clara Pueblo.

Under the position of the Court of Appeals, the Plaintiffs and their amicus, the right of Indian people to govern themselves would be a charade. Sovereignty is truly stripped if a tribe cannot determine who its citizens are; if it must grant citizenship based on alien standards, in the present case, in a way that the record shows, without dispute, would destroy the tribe's culture.

Indian tribes are allowed the right to define and protect their cultures as they see fit and to develop their societies as they choose, even if tribal policies differ from the policies of mainstream America.

This is what is meant by the policy of Indian Self-determination. This is the policy enacted by Congress and it should not be subject to nullification by the courts.

CONCLUSION

The judgment of the Tenth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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